

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

UNITED TRANSPORTATION UNION

NMB Case No. 43

Claim of D. R. Hartwick
Suspension: Failure to
Protect Assignment

STATEMENT OF CLAIM: Request on behalf of Southern Conductor D. R. Hartwick for expungement of 30-day Level S record suspension and three year probation period and payment for time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the Parties, claim and subject matter herein, and that the Parties were given due notice of the hearing which was held on August 17, 2006, at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

Claimant was employed by the Carrier as a Conductor; his service with the Carrier began in July of 2002. During the period August 23, 2005 to September 30, 2005, Claimant engaged in a series of bumps, bids, and exercises of seniority, the effect of which was that he performed no service for the Carrier during the period. Claimant did not miss a call for an assignment nor was he called for an assignment. He simply "worked the system" so that none of his actions resulted in his performing work. There is no evidence that any of the actions he took were improper or that any of the statements he made in the exercise of his contractual rights were false.

The Carrier notified Claimant on October 3, 2005 to attend an investigation to ascertain the facts surrounding his alleged failure to protect his assignment and his alleged engagement in other employment. Following the Organization's requested postponement, the hearing was held on October 19, 2005. Based on the record of the hearing, the Carrier found Claimant guilty of the charges and issued him a Level S 30-Day Record Suspension and three-year probationary period. On July 12, 2006, the Carrier removed from Claimant's record all references to a violation of the prohibition against unauthorized employment.

The instant claim for Claimant's reinstatement was presented in due course, was progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that it proved, by substantial evidence, that Claimant failed to protect his assignment. It contends that Claimant engaged in the practice known as "sharp-shooting", which through the use of timely lay offs, bids, exercises of seniority, and avoiding notification, he was able to avoid actually performing any work for an extended period of time. It further asserts that Claimant failed to answer his telephone in an effort to avoid assignments.

The Carrier maintains that its General Orders require employees to protect their assignments. It further contends that its Policy for Employee Performance Accountability ("PEPA") establishes that five attendance violations (in any combination of "serious" and/or "non-serious") is grounds for dismissal. The Carrier asserts that Claimant committed six such violations and therefore, was subject to dismissal, but through its leniency, was only suspended.

BNSF rejects the Organization's anticipated argument that Claimant is entitled to exercise his seniority rights under the governing Agreement. It contends that Claimant avoided work by any means available, subverting the purposes of the Agreement and his obligations as an employee. The Carrier also asserts that Claimant improperly failed to accept notification of an assignment thereby avoiding being called for service.

The Carrier also rejects the Organization's anticipated argument that the Carrier failed to prove that Claimant missed a call for an assignment. The Carrier argues that is not the charge against Claimant, and it points out that Claimant never put himself in the position where he could be called for work.

The Carrier maintains that Claimant's suspension was warranted based on the violation cited. It urges that the claim be denied and Claimant's suspension be upheld.

The Organization argues that the Carrier failed to prove that Claimant violated the governing Agreement. It contends that Claimant merely exercised his rights in conformity with the Agreement. The Organization acknowledges that the Carrier claims a violation of its rules and policies. It asserts, however, that the Carrier is attempting to gain through arbitration rights that which it properly can only obtain in collective bargaining.

The Organization admits that Claimant is engaged in the real estate business, but it contends that he pursues it as a hobby only and is self-employed. It asserts that it is pure speculation that Claimant engaged in real estate transactions while he was not working for the Carrier.

The Organization asserts that the Carrier relies on land lines - an outmoded means of communication - for communication with employees, but does not use newer methods of communication, such as email, cell telephones, and blackberries. It contends that the Carrier has proved nothing other than that Claimant was not present at his land line when it called him in an attempt to notify him of an assignment.

The Organization maintains that the only thing that the Carrier proved was that Claimant had an in-depth knowledge of the schedule rules and the bid and seniority systems. It concedes that Claimant used his knowledge to his own advantage, but argues that is neither a violation of any rule, immoral, inappropriate, nor unjust and asserts that it cannot be the basis for discipline.

The Organization urges that the claim be sustained.

DISCUSSION AND ANALYSIS: Claimant's suspension is based on the alleged violation of two provisions of the General Code of Operating Rules ("GCOR"), Rule 1.15 Duty - Reporting or Absence and Rule 1.16 Subject to Call.

Rule 1.15 provides in part that "* * * [c]ontinued failure by employees to protect their employment will be cause for dismissal". The Carrier argues that Claimant failed to protect his employment by "consistently and methodically avoiding performance of service". There is substantial evidence that Claimant did not perform service for a substantial period of time, but the record demonstrates that he did so through legitimate exercise of his rights to bid, exercise his seniority, and lay off. The Carrier may not discipline employees for exercising their contractual rights.

Although the Carrier asserts that he failed to make himself available, particularly by means of not answering his telephone, the record does not contain the required quantum of evidence to demonstrate that his failure to respond was the result of an intentional effort to avoid receiving a new assignment.

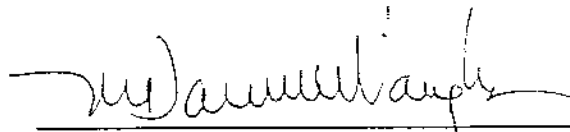
Rule 1.16 provides that "employees subject to call must indicate where they can be reached and must not absent themselves from their calling place without notifying those required to call them". The Organization asserts that the difficulty that the


Carrier had in contacting Claimant was attributable to its use of out-of-date land line technology. It also points out the alleged inequity in requiring employees to respond immediately when the Carrier allegedly does not notify employees immediately. Whatever the inequities and/or inadequacies, if any, of the present notification system, the validity or sufficiency of that system is not the subject of this claim. The Parties and Claimant are required to operate with the product of their negotiations that yielded the present system. That system places a burden on employees to notify the Carrier where they can be reached. There is substantial evidence that the Carrier was not able to contact Claimant using the system that was in place at the time relevant. Claimant's failure to notify the Carrier where he could be reached constitutes a violation of Rule 1.16.

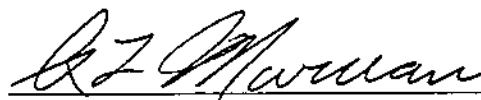
For an employee, making him/herself available for work is a basic element of the employment relationship. Failure to do so is contrary to a principal premise of that relationship. In the present matter, the substantial evidence of violation of Rule 1.16 warrants appropriate discipline. In view of the fact that the Level S 30-Day Record Suspension was related to the alleged violation of Rules 1.15 and 1.16, part of which was not sustained, the Board reduces the suspension to 20 days and the period of probation to one year. The Award so reflects.

AWARD: The Carrier proved Claimant's violation of Rule 1.16 by substantial credible evidence on the record as a whole, but failed to prove Claimant's violation of Rule 1.15. The Board modifies the penalty imposed to a 20-Day Record Suspension and the probation period to one year. Claimant's record shall be adjusted to reflect the terms of the Award.

Dated this 29th day of September, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire
Carrier Member


R. L. Marceau
Organization Member